Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies	)	
Affecting the Conversion	)	RM 9832
To Digital Television	)	

COMMENTS IN SUPPORT OF
ACME COMMUNICATIONS, INC.
PETITION FOR RECONSIDERATION

Marri Broadcasting, L.P. ("Marri"), by its counsel, hereby submits these comments in support of the petition for reconsideration ("the Petition") filed on November 3, 2004 by ACME Communications, Inc. ("ACME") with regard to the *Report and Order*, FCC 04-192 (September 7, 2004) (*"Report and Order"*) in the above-captioned proceeding.

ACME and Marri, among others, are competing applicants for a construction permit for a new television station serving Lexington, KY. These applications were filed prior to 1997 and are mutually-exclusive. The competing applicants entered into settlement agreements to resolve this mutual-exclusivity. These agreements were entered into in accordance with Section 309(l)(3) of the Communications Act, which calls for the Commission to waive its rules to facilitate the grant of settlements of such pre-1997 conflicting applications.[1] Although the Lexington applications were filed in 1996, no construction permit has been issued – 8 years later.

---

[1] As is pertinent, Section 309(l) states: "With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall __ ...(3)

The *Report and Order* would have the effect of casting the pre-1997 applications into a secondary status until after the conclusion of the channel election and repacking process, or at least another three years. However, deferred processing of pre-1997 applications cannot be reconciled with the Commission's own understanding that Section 309(l)(3) "require[s] that the Commission must waive applicable provisions of its regulations in all instances in which settlement agreements are filed ...."[2] There can be no question that Section 309(l)(3) expresses a Congressional intent to see pre-1997 applications granted,[3] an intent that is inconsistent with deferring action on these applications while the repacking process proceeds.[4] While Marri is sensitive to the importance placed by the Commission on the digital transition process, that process cannot be considered of such high priority that other statutory priorities are ignored. In fact, Section 309(l)(3) was enacted after Congress began the digital transition process in the Telecommunications Act of 1996, indicating that Congress did not intend the digital transition process to hamper achievement of Section 309(l)(3)'s goals.

---

waive any provisions of its regulations necessary to permit such persons to enter an agreement to procure the removal of a conflict between their applications...."

[2] *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, MM Docket No. 97-234, at ¶ 26, rel. Nov. 26, 1997 (NPRM).

[3] The Commission has stated that Section 309(l)(3) contemplates settlement agreements to remove a conflict between applications. *SL Communications, Inc. v. FCC*, 168 F.3d 1354 (D.C. Cir. 1999). That contemplation is meaningless, and absurd, unless it also is understood to represent a Congressional intent that the Commission grant a construction permit.

[4] "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991). Indeed, the challenged portion of the *Report and Order* also exceeds the Commission's statutory rule making authority which is to "make such rules and regulations and provide such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...." 47 U.S.C. § 303(r) (emphasis supplied); *Kay v. FCC*, 443 F.2d 630, 643 (D.C. Cir. 1970).

Marri believes that the Commission has a statutory obligation to give priority to these pre-1997 applications and that the *Report and Order* violates that obligation. Although granting ACME's request for reconsideration would not give the pre-1997 applications this priority, it at least would be a step in the right direction. ACME proposes that the Commission issue a notice of proposed rule making ("NPRM") for the allocation of analog channel 20 to Lexington, KY contingent upon the resolution of conflicting expressions of interest made by broadcasters needing an in-core DTV allotment. As ACME notes, the FCC can issue the NPRM with the qualification that the proposed allotment of Channel 20 in Lexington, Kentucky will *not* be protected in completing the final DTV Table of Allotments if comments are filed by an existing television licensee who indicates a need for the channel. Petition at 5. This middle ground solution respects and reconciles Section 309(l) and the digital transition process which, as discussed above, is a legal necessity.[5] Moreover, since this action would be procedural rather than outcome determinative, the Commission can issue the NPRM free from concern that it has committed itself to any course of action.

[5] The Commission is bound to give effect to both statutory directives. *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Blackfoot Indian Tribe v. Montana*, 838 F.2d 1055, 1058 (9th Cir. 1988).

Finally, the preclusive study attached to the Petition shows that there is every reason to believe that the Commission will be able to grant the Lexington settlement agreements and license channel 20 in Lexington without impairing the DTV repacking process. Accordingly, a grant of the Petition is both required by law and consistent with the public interest. Indeed, there is simply no basis for not granting the Petition.

Respectfully submitted,

MARRI BROADCASTING, L.P.

By: Thomas J. Dougherty, Jr. (FAX)
Thomas J. Dougherty, Jr.
Its Counsel

GARDNER CARTON & DOUGLAS LLP
1301 K Street, N.W., Suite 900 East Tower
Washington, D.C. 20005
(202) 230-5164
November 15, 2004

DC01/ 469555.1

CERTIFICATE OF SERVICE

I, Donna B. Fleming, a secretary in the law firm of Gardner Carton & Douglas LLP, do hereby certify that on the 15th day of November 2004, a copy of the foregoing **"Comments in Support of Petition for Reconsideration"** of Marri Broadcasting, L.P. was hand delivered or sent by first-class mail, postage prepaid to the following:

The Honorable Michael Powell *
Chairman
Federal Communications Commission
Portals II, Room 8-B201
445 Twelfth Street, SW
Washington, DC 20554

The Honorable Kathleen Abernathy *
Commissioner
Federal Communications Commission
Portals II, Room 8-B115
445 Twelfth Street, SW
Washington, DC 20554

The Honorable Michael Copps *
Commissioner
Federal Communications Commission
Portals II, Room 8-A302
445 Twelfth Street, SW
Washington, DC 20554

The Honorable Kevin Martin *
Commissioner
Federal Communications Commission
Portal II, Room 8-A204
445 Twelfth Street, SW
Washington, DC 20554

The Honorable Jonathan Adelstein *
Commissioner
Federal Communications Commission
Portals II, Room 8-C302
445 Twelfth Street, SW
Washington, DC 20554

W. Kenneth Ferree, Chief *
Media Bureau
Federal Communications Commission
The Portals II, Room 3-C740
445 Twelfth Street, SW
Washington, DC 20554

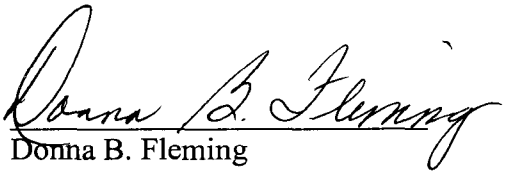
Robert Ratcliffe, Deputy Chief *
Media Bureau
Federal Communications Commission
Portals II, Room 3-C486
445 Twelfth Street, SW
Washington, DC 20554

Barbara Kreisman, Chief *
Video Div., Media Bureau
Federal Communications Commission
Portals II, Room 2-A666
445 Twelfth Street, SW
Washington, DC 20554

Clay Pendarvis, Assistant Chief *
Video Div., Media Bureau
Federal Communications Commission
Portals II, Room 2-A662
445 Twelfth Street, SW, RM 2-A662
Washington, DC 20554

Andrew S. Kersting, Esq.
Dickstein Shapiro Morin & Oshinsky, LLP
2101 L Street, NW
Washington, DC 20037-1526

Counsel for ACME Communications, Inc.



Donna B. Fleming

* Hand Delivered